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IN THE

Supreme Court of the United States.

October Term, 1928.

No. 183.

HENRY LEONARD, *Petitioner*,

v.

THE UNITED STATES.

Brief in Support of Petition for Writ of Certiorari to the Court of Claims.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This is a claim of an officer, United States Marine Corps, on the retired list, his retirement being for wounds received in battle.

His claim is to be paid as a retired major from May 8, 1926, to date of filing his petition and continuously thereafter by counting all service rendered on both the active and retired lists in computation of his length of service for purposes of pay. He is being paid (Finding II, R. 7):

"the same as the base pay prescribed for a major of the Marine Corps of more than 14 years' service in the fourth pay period. He has also been paid longevity pay as a major of 27 years' service by reason of being retired for wounds.

"If paid as a major entitled to credit of 27 years'

service, he would receive as a major in the fifth pay period a difference of pay amounting from May 8, 1926, to March 31, 1927, to $723.41."

His claim is for the recovery of the last named sum as the pay due a major in the fifth pay period. What is meant by the term "pay period" will appear by an examination of the act of June 10, 1922 (c. 212, 42 Stat. 625), hereinafter quoted.

The act of June 10, 1922, by the provisions of its 1st and 17th Sections excluded officers already on the retired list from any change of pay by virtue of its provisions. This restriction was removed by the act of May 8, 1926 (c. 274, 44 Stat. 417), as stated in the opinion of the Court of Claims (R. 9). The discrimination against officers already retired created by the act of June 10, 1922, was thus cancelled by that of May 8, 1926, so that from that date the case is to be determined entirely by the act of June 10, 1922.

LEGISLATION AND DECISION.

By Revised Statutes, Sections 1261, 1262, 1263, certain rates of pay were fixed for officers of each grade or rank in the Army with an increase of ten per cent for each five years' service.

By Revised Statutes, Sections 1612, 1622, officers of the Marine Corps are to receive the same pay and allowances as those of the Army and are to be retired in the same manner.

This court in *United States* v. *Tyler*, 105 U. S. 244, held that the "service" on which the ten per cent increase was to be computed was not only service on the active list but service in an inactive status after retirement.

To overcome the effect of that decision in all but the most highly meritorious cases, Congress made the following provision March 2, 1903 (c. 975, 32 Stat. 932):

"That hereafter, except in case of officers retired on account of wounds received in battle, no officer now on the retired list shall be allowed or paid any further increase of longevity pay, and officers hereafter retired, except as herein provided, shall not be allowed or paid any further increase of longevity pay above that which had accrued at date of their retirement."

This provision cut off longevity increases accruing to officers after their retirement except in the single case of "officers retired on account of wounds received in battle." This officer belongs to that class.

Thus matters continued until June 10, 1922, when Congress by the Joint Service Pay Act (c. 212, 42 Stat. 625) adopted a new scheme of pay periods based upon a combination of rank and length of service. By this act "The pay of the fifth period ($3,500) shall be paid * * * to majors * * * who have completed twenty-three years' service * * *." "The pay of the fourth period ($3,000) shall be paid * * * to majors * * * who have completed fourteen years' service." "The pay of the third period ($2,400) shall be paid to majors * * * not entitled to the pay of the fourth, fifth, or sixth period." An increase of five per cent of the base pay is added for each three years' service up to thirty years.

"For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay," etc.

WHAT SERVICE COUNTS FOR BASE OR PERIOD PAY?

Finding II (R. 7) shows that the officer receives "longevity pay as a major of 27 years' service by reason of being retired for wounds." The benefit of the same service is, however, refused to him in the computation of his base or period pay on the following ground (Opinion, R. 10, 11):

"There is nothing in Section 17 of the act of June 10, 1922, that sustains it and the provision to be found in Section 1 of the act, 42 Stat. 627, that 'For officers in the service on June 30, 1922, there shall be included in the computation all service which is now counted in computing longevity pay' does not refer to or include officers on the retired list. It has reference to officers on the active list."

This court decided to the contrary of that proposition in *United States* v. *Tyler*, 105 U. S. 244, where the court said, as to officers retired from active service (p. 245):

"The question is, therefore, whether an officer thus situated is in the service within the meaning of section 1262. That section allows an increase of pay for every five years' service. When the service ends, there can be no increase on that account. As long as the service continues, the increased pay applies whenever it amounts to five years.

"The law under which these officers are retired does not require their consent, nor does it require that the order for their retirement shall be based upon any absolute incapacity for further service. It may be based upon age, which, being fixed at a minimum of sixty-two years, by no means implies such incapacity. It may be based upon wounds received in battle, but the person retired for this cause may, for many purposes, be a very useful officer.

"The provisions of the statutes, and the uniform treatment of these officers, conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit."

The following conclusion was reached (p. 246):

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial, from the service in disgrace, are still *not* in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States. And if, because they were not required to do full service thereafter, their compensation was diminished by the statute twenty-five per cent, that is no reason why the accounting officers should add a further limitation of pay not found in any statute.

"We are of opinion that retired officers are in the military service of the government, and that the increased pay of ten per cent for each five years' service applies to the years so passed in the service after retirement as well as before."

Congress subsequently to this decision interposed by the act of March 2, 1903 (*ante*, p. 3), to draw a distinction between an officer retired for age or disease and one retired for wounds received in battle. That act provided that longevity increases should go on

after retirement as decided by this court in the *Tyler* case only where the officers were retired for wounds received in battle. All other officers ceased to earn longevity increases after their retirement.

At the time of the enactment of the act of 1903 the only kind of pay affected by length of service was the addition of 10 per cent for every five years' service. The new act of June 10, 1922 (*ante*, p. 3), provided a new scheme of pay. It made all service now counted in computing longevity pay applicable to the computation of all the pay periods provided by that act as well as of the five per cent increase for each three years of service allowed thereby.

At present this officer is being paid in the anomalous status of an officer of *twenty-seven* years' service for computing his 5 per cent increase for each three years' service, but of only *fourteen* years' service in computing his base or period pay. Plainly an officer can not be of one length of service for counting one item of his pay and of another and different length of service for counting another item.

A CLASS CASE INVOLVING NUMEROUS OFFICERS.

The published Army Register shows the cause of retirement of all officers. An actual count of the names in the Register for 1928 shows a total of 86 officers retired for wounds received in battle.

The Navy Register, which contains the names of officers of the Navy and Marine Corps, shows the officers retired for disability incurred in line of duty, but does not discriminate between those retired for disease and those retired for wounds received in battle.

We are informed that there are at least 41 officers of

the Marine Corps retired like the petitioner for wounds received in battle. The number of officers of the Navy retired for that cause must be much larger. The Solicitor General will probably be in a position to state in his brief in response to this petition, on information which can be obtained from the Navy Department, how many officers of the Navy and Marine Corps, respectively, are on the retired list for wounds received in battle, and whose pay, present or future, will be affected by the decision of this case.

The existence of this large number of officers of a highly meritorious class whose rights will be affected by a decision of the present case affords a conclusive reason for the granting of a writ of certiorari to bring the question before this court on its merits.

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